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NO. _____

IN THE

SUPREME COURT OF THE UNITED STATES

_____ Term, 1987

MICHAEL HUGHES, NANCY OWEN, and
COLES COUNTY,

Cross-Petitioners,

-vs-

JAMES R. OHSE,

Cross-Respondent.

CROSS-PETITION FOR WRIT OF CERTIORARI FROM THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

Steven M. Helm, John P. O'Rourke
DUKES,O'ROURKE,STEWART,MARTIN
& HELM, LTD.
146 N. Vermilion
Danville, IL 61832-4794
Phone: 217/442-0384

Counsel for Petitioner

QUESTION PRESENTED FOR REVIEW

1. Whether the Court of Appeals of the Seventh Circuit has applied the provisions of the First and Fourteenth Amendment to the United States Constitution in a manner directly in conflict with the decision of the United States Supreme Court in Connick v. Myers.

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The Cross-Petitioners, MICHAEL HUGHES, NANCY OWEN and COLES COUNTY, respectfully pray that a Writ of Certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Seventh Circuit entered in the above-captioned proceeding on April 15, 1987.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Seventh Circuit is reported at 816 F. 2d 1144 (7th Circ. 1987), and is reprinted in the Appendix hereto at APP-1.

The opinion and order of the United States District Court for the Central District of Illinois granting Cross-Petitioners' Motions for Summary Judgment is unreported. It is reprinted in the Appendix at APP-28. The opinion of the District Court denying Respondent's, JAMES R. OHSE, Motion to Alter Judgment is unreported. It is reprinted in the Appendix at APP-71.

JURISDICTION

The judgment of the United States Court of Appeals for the Seventh Circuit which Cross-Petitioners request this Court to review was entered April 15, 1987.

Jurisdiction of this Court is invoked pursuant to 28 U.S.C. Sect. 1254(1) and Supreme Court Rule 19.5. Respondent James R. Ohse filed a Petition for Writ of Certiorari to the United States Supreme Court with attached "Appendix", Docket Number 87-5269 which was docketed on August 10, 1987. The Petition for Writ Of Certiorari was received by counsel for Cross-Petitoners on August 7, 1987 and jurisdiction of the Court is sought pursuant to Supreme Court Rule 19.5. The parties of record in 87-5279 are James R. Oshe, Petitioner vs. Michael Hughes, Nancy Owen, William J. Sunderman, Joseph R. Spitz, and Paul C. Komada, Respondents.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The First Amendment to the United States Constitution provides as follows:

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

The Fourteenth Amendment to the United States Constitution provides in Section 1 as follows:

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, libery, or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

42 U.S.C. Sect. 1983. Civil action for deprivation of rights: Every person who, under color of any statute, ordinance, regulation, custom or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

STATEMENT OF THE CASE

On December 12, 1977 James Ohse was appointed adult probation officer in an

office headed by Michael L. Hughes, Chief adult and juvenile probation officer for Coles and Cumberland County, Illinois. In late 1980 or early 1981 friction developed between Ohse and Hughes. The friction was prompted in part by the promotion of a fellow employee, Vicki Starwalt, to the position of Chief Deputy Probation Officer. By the spring of 1981 Ohse and Hughes spoke to each other only when necessary. APP-2. In April of 1982 Hughes approached Ohse about complaints he had received regarding Ohse. In May 1982 the situation degenerated to a point where Hughes and Ohse had a confrontation at a staff meeting which was marked by name calling. APP-2. On May 24, 1982 Ohse conversed with a fellow employee and a deputy sheriff about allegedly improper conduct occurring at the Coles/Cumberland Probation office. APP-2. At the staff

meeting Hughes admitted the incidents of drinking on the job by several staff members and the falsifying of mileage reports. APP- 2 . Hughes stated "...we'll all start fresh, we'll all start anew from this point." Hughes Deposition page 35. APP- 3 . Hughes revised the office policy manual and wrote Chief Circuit Judge Ralph Pearman indicating he intended to abide strictly by the rules therein. APP- 3 . On June 25 or 26, 1982, Hughes evaluated Ohse's work. Ohse was rated as "adequate" to "exceptional". APP- 3 . On June 29, 1982, Ohse and Hughes again had a confrontation. APP- 33 .

On August 11, 1982 Ohse complained about the evaluation in a Memorandum to Hughes.

On November 23, 1982 Ohse filed a seventeen page grievance with Hughes.

The grievance detailed their tumultuous personal history and questioned the veracity of Hughes' claim that he had received complaints about Ohse from employees at the State's Attorney's office. No issues of public concern were raised. Hughes responded to the grievance by meeting with three of the Defendants in this case; Circuit Judge Spitz, Sunderman and Komada. Hughes asked the Judges what he should do. They replied Hughes' evaluation was acceptable and nothing further need be done. Thereafter, on December 2, 1982 Hughes told Ohse his grievance had lacked merit. On December 11, 1982 Ohse sent his written grievance to Judge Pearman. On December 22, 1982 Ohse sent a Memorandum addressed "To Whom it May Concern" to Pearman, the three Defendant Judges and certain County Board members in the Coles County State's

Attorney's office. The letter alleged the improper conduct in the Hughes headed probation office. Ohse's letter called for an investigation and the filing of criminal charges. APP- 4 .

Judge Baker found the only accusations which rise to the level of public concern are the inappropriate mileage charges and other possible misuse of county materials and time. He further found the improper mileage charges were exposed and the practice ended by Hughes several months prior to Ohse's letter to the Judges. APP- 62 .

On December 27, 1982 Defendant, Nancy Owen, State's Attorney for Coles County, informed Ohse by letter that criminal charges would not be filed against Hughes. On the next day, December 28, 1982, Judge Pearman informed Hughes that he believed Hughes' defenses to the Ohse allegations

were sufficient and nothing further would be done. On January 3, 1983 Hughes suspended Ohse and also requested Ohse's termination, alleging various acts of insubordination. On January 6, 1983, Judge Pearman appointed Defendant Judges, Sunderman, Spitz and Komada to investigate Hughes' request to terminate Ohse. A hearing was held on February 1, 1983. On February 2, 1983 a decision was issued terminating Ohse. APP-____.

On March 16, 1983 Ohse filed the Instant 42 U.S.C. Sect. 1983 action in the United States District Court for the Central District of Illinois. His Complaint alleged among other things that he had been fired in violation of his 14th Amendment Right to Free Speech. Jurisdiction was invoked pursuant to 28 U.S.C. Sect. 1331, 1343, 2201 and 2202. The United State District Court granted

Summary Judgment to each of the Defendants on September 26, 1985 and denied the Petitioner's Motion to Alter Judgment on October 28, 1985.

Petitioner appealed to the Court of Appeals for the Seventh Circuit, and the Court decided to remand the case to the District Court for decisions of fact concerning Ohse's claim based upon a denial of free speech under the 14th and 1st Amendments of the United States Constitution. The Court also decided that the three Defendant Judges would be dismissed from the lawsuit for the reason that they enjoy absolute judicial immunity. APP- 22 . Ohse filed a Motion for Rehearing and it was denied on May 14, 1987. APP- 26 .

ARGUMENT

This Cross-Petition for Writ of Certiorari is premised on the fact that

the Seventh Circuit Court of Appeals has sorely misapplied the United State Supreme Court decision in Connick v. Myers, 461 U.S. 138 (1983). Connick provides a further extension of the principles laid down by the U.S. Supreme Court in Pickering v. Board of Education, 391 U.S. 563 (1968). Pickering set forth a two pronged analysis to determine whether certain speech of a public employee is constitutionally protected under the First and Fourteenth Amendments to the United States Constitution. The first step in the analysis is to determine whether the speech is "a matter of legitimate public concern" upon which "free and open debate is vital to informed decision-making by the electorate" 391 U.S. at 571-572. The second task of the Court is to strike a "balance between the interests of the [employee], as a citizen, in commenting

upon matters of public concern and the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees." Pickering at 568, Connick v. Myers, 461 U.S. 138, 142. The mission of the U.S. Supreme Court in Connick was to further define the mechanics in applying this balancing test. The Seventh Circuit's application of the balancing test in the present case is directly in conflict with the detailed analysis set forth in Connick.

The first factor to consider in the Pickering balance test is the interest of the public employee, as a citizen, in commenting upon matters of public concern. In other words, it is not sufficient in considering the public employee's interests as a public employee in speaking of matters of public concern. We are to

look at the public employee from his status as a citizen of these United States and not simply as a person employed by government. It appears that this distinction was not considered by the Seventh Circuit Court of Appeals. This becomes very apparent when looking to the factors the Court considered in the analysis. Those factors were stated as follows:

> "(1) whether the speech impeded the employee's ability to perform her responsibilities; (2) the importance of close working relationships with superiors and co-workers; (3) the time, place, and manner in which the speech was delivered; and (4) the context in which the underlying dispute arose." APP-12.

These are all very important factors. However, they are not dispositive. The Seventh Circuit's failure to look at Ohse 'as a citizen' becomes apparent from that Court's prior decision in Patkus v. Sangamon-Cass Consortium, 769 F. 2d 1251 (1985). Therein, the Seventh Circuit

listed several factors that need to be considered in the Pickering balancing test. One of the factors listed in that case is "whether the speaker should be regarded simply as a member of the general public". Patkus at 1258. There is nothing in the Seventh Circuit Court's opinion in the present case which would indicate that Ohse was being viewed as a citizen and not simply as a public employee. Had the Seventh Circuit considered that factor, they would surely have reached a different result; for Ohse's statements came at such a time when a regular citizen would have little interest. As stated by Judge Harold Baker in his Order of September 26, 1985 the improper practices "were exposed and the practice ended by Hughes several months prior to Ohse's letter to the Judges." APP-62. Ohse's interest in speaking of

the alleged improprieties of Hughes and/or his staff were legitimate during the time that those improprieties were being practiced. However, once the conduct had been corrected, Ohse's interest as a citizen in seeing that they were corrected no longer existed. A citizen has a legitimate interest in correcting unfavorable conduct by public officials. However, once that conduct has been corrected, that interest no longer exists.

One of the factors listed by the Seventh Circuit in approaching the balancing test was the context in which the underlying dispute arose. APP-12. This is listed as an important consideration in Connick. 461 U.S. at 153. Although the Seventh Circuit mentioned the context in which Hughes suspended Ohse, there is nothing to indicate that the context of Ohse's speech was

considered. In its opinion, the Seventh Circuit stated as follows:

> "Interestingly, it was only six days after Judge Pearman informed Hughes that his defenses to the Ohse allegations were adequate that Hughes suspended Ohse, triggering the process that would lead to Ohse's termination." APP-15.

Isn't it of equal interest that Ohse's letter to Judge Pearman came only after both his prior objection to his personnel evaluation and the denial of his personal grievance. The context in which Ohse's 'To Whom It May Concern' letter was written is extremely important for the Court to consider. That letter was not written by Ohse as a concerned citizen. It was written by a disgruntled employee who was unhappy with his evaluation and his subsequent failure to have that evaluation revised.

In considering the context in which Ohse's letter was written, the reasoning of the Supreme Court in Connick logically

applies. Therein, it is stated as follows:

"We hold only that when a public employee speaks not as a citizen upon matters of public concern, but instead as an employee upon matters only of personal interest, absence the most unusual circumstances, a Federal Court is not the appropriate forum in which to review the wisdom of a personnel decision taken by a public agency allegedly in reaction to the employee's behavior." 461 U.S. at 147.

Although the matters addressed in the letter, when considered in a vacuum, may be deemed to be of public concern, the context in which they are raised is an important consideration. The importance of this is emphasized in Connick. Therein, the Supreme Court stated as follows:

"Finally, the context in which the dispute arose is also significant. This is not a case where an employee, out of purely academic interests, circulated a questionnaire so as to obtain useful research. Myers acknowledges that it is no coincidence that the questionnaire followed upon the heels of the transfer notice." 461 U.S. at 153.

In the present case, it is no coincidence that the letter from Ohse

was written and delivered only after unfavorable personnel decisions were made toward him. This is not a case where an employee, as a concerned citizen, wants to curb abuses in a public office. As stated earlier, this is a case where an employee has seized an opportunity to slash out at his supervisor. Ohse's statements in the letter had no other purpose.

The identical reasoning set forth above applies to another factor considered important in Connick but ignored by the Seventh Circuit in their decision in Ohse. The time, place and manner in which the speech was delivered is a relevant concern. Connick at 152-153. The importance of the timing of the statement is further emphasized by the Seventh Circuit in its earlier decision of Patkus v. Sangamon-Cass Consortium, 769 F. 2d 1251, 1258 (1985). There is no question

that the statements contained in Ohse's letter were made at a time when no legitimate purpose could be served thereby. The misconduct of which Ohse was complaining had already been corrected. APP- 62 . Just as it was relevant in Connick to consider that the speech in question "emerged after a persistent dispute between Myers and Connick and his deputies over office transfer policy" 461 U.S. at 154, so is it relevant in the present case that Ohse's letter emerged after a persistent dispute between Ohse and Hughes over his evaluation. As stated by Judge Baker: "When put into the context of the chronology of events beginning in 1981, the charges against Hughes are revealed as an extension of Ohse's grievance about his evaluation and possibly his unhappiness at Vicki Starwalt's promotion." APP- 62 .

The Seventh Circuit failed to consider the timing and manner of Ohse's speech as important factors in the balancing test. It was only concluded that the particular matters brought up by Ohse were matters of public concern. That is only the first part of determining whether speech is protected. The Seventh Circuit merely adopted their prior conclusion that the letter addressed issues of public concern as conclusive to the first part of the balancing test. Ohse's interest, as a citizen, was not analyzed whatsoever. Had the important factors listed above entered into the equation, the Seventh Circuit would clearly have reached a different result. The failure of the Seventh Circuit to consider these factors is in direct conflict with the Supreme Court's decision in Connick.

After evaluating the interest of the employee, as a citizen, it is then time to look at the State's interest in promoting the efficiency of its services. Connick at 142. We need go no further than the Seventh Circuit's opinion. Therein it is stated:

> "The 'to whom it may concern' letter may have disrupted the office, undermined Hughes' authority, and hindered close working relationships in a manner which may best be described as inevitable..." APP-15.

It is acknowledged, therefore, that Ohse's letter had a disruptive influence on the efficient fulfillment of the probation department's responsibilities to the public.

There can be no question that Ohse's letter served to further alienate any possible relationship he might have with his supervisor, Hughes. It is also clear that the letter served to strain the relationship between Ohse and his fellow

employees. Although the Seventh Circuit stated that there was no evidence that Ohse could not get along with a large majority of his fellow employees, APP-17, the contrary is true. Including Ohse and Hughes, there were six probation officers in Coles/Cumberland County. APP-79. Ohse admitted that none of the other probation officers would speak to him. APP-78. Since none of the other employees of a very small office had talked to him this conclusion by the Seventh Circuit has no factual basis. What can be concluded is that Ohse had put up a large barrier between himself and all other employees in the Coles/Cumberland County probation office. Ohse's letter, therefore, served to disrupt the workings of the government's office. As this Court is most likely aware, probation officers often have to work together on cases.

With such a barrier between Ohse and everyone else, the office could not run efficiently.

The decision of the Seventh Circuit sorely misapplies the principle set down in Connick v. Myers. As stated in Connick, it is not necessary "for an employer to allow events to unfold to the extent that the disruption of the office and the destruction of working relationships is manifest before taking action." 461 U.S. at 152. The Seventh Circuit failed to heed to "the common sense realization that government offices could not function if every employment decision became a constitutional matter". 461 U.S. at 143. In short, the Seventh Circuit failed to properly conduct the Pickering balance test as that test was defined in Connick v. Myers. Had it done so, the decision clearly would be that Ohse's speech was not constitutionally protected.

CONCLUSION

Had Ohse written his To Whom It May Concern letter prior to filing his personal grievance, prior to the denial of his personal grievance, or prior to objecting to his personnel evaluation, Ohse would be speaking as a citizen on a matter of public concern. At the time Ohse raised his complaints, the alleged objectional activities had stopped. Ohse was speaking for personal gain; not to communicate First Amendement speech as a citizen. This subtle distinction between speaking as an employee on a personal matter and as a citizen on a matter of public concern is a theme raised in Pickering v. Board of Education and emphasized in Connick v. Myers. This theme was overlooked by the Seventh Circuit and resulted in the misapplication of the Pickering and Connick decisions.

The Seventh Circuit has departed from the precedent of this Court and its own decisions in improperly applying the Pickering and Connick decisions. In so deciding the Seventh Circuit has placed an undue burden upon public employers and has made it impossible for public employers to efficiently and fairly discharge their duties.

This Court should exercise its authority here to assure that the balancing test of Pickering v. Board of Education, supra, and the holdings of Connick v. Myers, supra, are applied correctly.

For the foregoing reasons, this Petition for Writ of Certiorari should be granted.

Respectfully submitted
MICHAEL HUGHES, NANCY OWEN and
COLES COUNTY, Cross-Petitioners
BY: DUKES,O'ROURKE,STEWART,
MARTIN & HELM, LTD.,
Their Attorneys

BY: _____
STEVEN M. HELM
JOHN P. O'ROURKE

STEVEN M. HELM
JOHN P. O'ROURKE
DUKES,O'ROURKE,STEWART,MARTIN
& HELM, LTD.
146 VERMILION PARK MALL
DANVILLE, IL 61832-4794
PHONE: 217/442-0384